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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1190

ALL ISLAND DELIVERY SERVICE, INC., *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT
The National Industrial Traffic League

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JURISDICTION

In addition to the statutory provision cited by petitioners, jurisdiction in this Court is based on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the action taken by the Interstate Commerce Commission to protect the paramount right of independent action unconstitutionally restrict the right of motor carriers to use a rate bureau to seek suspension and investigation of a rate tariff?

2. Was the I.C.C.'s action authorized by Section 5a of the Interstate Commerce Act and, if so, was it inconsistent with Section 216(e)?

ARGUMENT

No Substantial Constitutional Issue Exists Which Requires Review

To place the constitutional issue raised by petitioner in its proper context, and to illuminate clearly its insubstantiality, it is necessary to highlight the important provision of Section 5a which provided the statutory basis for the actions of the Interstate Commerce Commission and the court of appeals. Section 5a(6) prohibits the I.C.C. from granting immunity from the antitrust laws for any agreement among carriers for joint consideration of rates "unless it finds that . . . there is accorded to each party the free and unrestrained right to take independent action . . . " The I.C.C. and the court of appeals both recognized that the right of independent action " . . . . is paramount to maintaining the integrity of the grant of antitrust immunity."[1]

The I.C.C., after reviewing the evidence in the record before it, concluded that in order to protect the absolute right of a carrier member of a rate bureau to take independent action, it must prohibit the bureau from seeking to obtain an investigation and suspension by the I.C.C. of the independent action of its own members.[2] This is the kind of retaliatory action against independent action which inhibits and stifles competition[3] and "chills" the exercise of independent action.[4]

A reasoned consideration of the judicial and administrative actions under review in the context of the

[1] 349 I.C.C. at 844 and 559 F.2d at 1255, reproduced in petitioners' appendix at 50a and 8a, respectively.

[2] Once a carrier determines to take independent action on rates, it must then file a tariff with the I.C.C. publishing the rate proposal. Section 217, 49 U.S.C. §317.

[3] 349 I.C.C. at 845, 351 I.C.C. at 460, App. 51a and 91a.

[4] 359 F.2d at 1255, App. 8a.

Congressional policy protecting independent action will reveal the insubstantiality of the constitutional issue these few carriers have tried to raise. There can be no serious contention that the Commission's action was an unconstitutional infringement of the petitioning carriers' First Amendment right to petition the I.C.C. for relief. These carriers still have that right, collectively or individually, as the I.C.C. recognized.[5]

When collective action by such carriers to petition for relief is taken (whether or not they use a rate bureau), it is immune from the antitrust laws because of the importance of the activity under the First Amendment. See *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972).[6] The principles discussed in that case suggest that a protest by a rate bureau against independent action would be constitutionally protected from antitrust liability by the *implied* immunity discussed in that case despite the I.C.C.'s withdrawal of the *express* immunity otherwise available under the statutory authority of Section 5a.

Why then are these few carriers so concerned with overturning the Commission's action? The answer must be that the implied immunity from the antitrust laws in the *California Motor Transport* case is subject to a very serious limitation, from their point of view. The collective activity cannot be a "mere sham" to cover an attempt to interfere directly with a competitor's business relationships. See 404 U.S. at 511-515.

To avoid this limitation on their collective action motor carriers would obviously prefer the protection of the express statutory immunity available to them if the Commission approved, or at least did not prohibit, the collective action involved in protests by a rate bureau against independent action tariff publications. See Section 5a(9), 49 U.S.C. §5b(9).

[5] 351 I.C.C. at 461, App. 92a.

[6] See also *City of Lafayette v. Louisiana Power & Light Co.*, ____ U.S. ____, 46 U.S.L.W. 4265, 4268 (March 29, 1978).

In substance, the petitioners are objecting only to the loss of their express statutory immunity to use a rate bureau as their agent for collective protests against the independent action rate proposals of their fellow members. Contrary to their claims, the I.C.C. and the court of appeals have not deprived them of any First Amendment right.

Even if the I.C.C.'s action could be considered a limitation on the exercise of such a right by these motor carriers, it is a legitimate limitation. Rate bureaus exist only at the sufferance of Congress, which has provided them with an express immunity from the antitrust laws. But for this immunity, there is no doubt that rate bureau agreements would be illegal price-fixing agreements. See *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 456 (1945).[7] Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

This Court has also held that the assertion of a First Amendment right does not confer blanket immunity from the antitrust laws. See, e.g., *Citizens Publishing Co.* v. *United States*, 394 U.S. 131, 139-140 (1969), and *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

The antitrust laws and the Interstate Commerce Act are both founded on Congress' constitutional authority to regulate commerce between the states. See *Northern Securities Co.* v. *United States*, 193 U.S. 197, 335-338 (1904), and *Louisville & N.R. Co.* v. *Mottley*, 219 U.S. 467, 480-486 (1911). These cases and their generations of descendants demonstrate the legitimate interest of Congress in the economic regulation under the commerce clause of carriers and the transportation industry.

This strong governmental interest, which is largely administered by the Commission, provides a solid basis for

[7] After the enactment of Section 5a, this action brought under this Court's original jurisdiction was dismissed. 340 U.S. 889 (1950).

whatever limited restriction has been placed on free expression by the Commission. The right to free expression is not absolute, and its exercise may be regulated by the government. This Court outlined the permissive scope of such regulation in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), reh. den., 393 U.S. 900:

> ". . . we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[8]

In this case, it is clear that Section 5a is within the constitutional power of Congress to enact, and it may delegate its administration to the Commission. The statute implements a legislative policy decision to accommodate certain conflicting policies of the antitrust laws and the Interstate Commerce Act.[9] The necessity for this accommodation is unrelated to any policy of suppression of free expression.

Finally, the restriction placed by the Commission on the right of the rate bureaus to protest is very limited. They are barred only from protesting independent actions of their own members. Moreover, the member carriers of a rate

[8] See also *Bates v. State Bar of Arizona*, ____ U.S. ____, 53 L.Ed. 2d 810, 835-836 (1977), *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 770-773 (1976), and *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975), which establish the authority of governmental agencies to regulate commercial speech.

[9] H.R. Rep't. No. 1100, 80th Cong. 1st Sess. (1947). See also 351 I.C.C. at 460, App. 91a.

bureau may still, in their own names, either individually or collectively, protest an independent action proposal by another member carrier. They must, however, observe the limits placed on such activity by this Court's decision in *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972).

The Agency's Action Is Consistent With The Statute

The motor carriers next contend that the I.C.C.'s action withdrawing from the rate bureaus express immunity for collective action seeking suspension of their own members' independent action tariff publications is not authorized by Section 5a. They also contend that, even if authorized, it is inconsistent with the provisions of Section 216(e).[10]

The petitioners contend that the Commission lacks statutory authority under Section 5a to condition its approval of rate bureau agreements with a prohibition against their claimed right to protest. The express provisions of the statute and the record before the Commission demonstrate the validity of its action. Section 5a of the Interstate Commerce Act represents an accommodation by Congress of the conflicting policies of the antitrust laws and the collective ratemaking practices of the carriers which had arisen from the various substantive requirements of the Interstate Commerce Act.[11]

The statutory scheme has been carefully constructed by the Congress to accomplish this accommodation. Section

[10] 49 U.S.C. § 316(e).

[11] See 351 I.C.C. at 460, App. 91a. Railroad rate bureaus are now governed entirely by the provisions of a new Section 5b of the Act, 49 U.S.C. §5c, added by Section 208 of the Railroad Revitalization and Regulatory Reform Act, 90 Stat. 42 (1976). This statute, it should be noted, expressly prohibits protests by railroad rate bureaus of an independent action of any other railroad. 49 U.S.C. §5c(5)(a)(iii).

5a(2) permits the carriers to enter into agreements with Commission approval establishing rate bureaus for joint consideration and establishment of carrier rates and charges. But the Commission cannot approve any agreements prohibited by Section 5a(6), which protects the right of independent action. As the Commission noted, Section 5a is permissive, and the carriers are not obligated to seek the express immunity from the antitrust laws granted when approval of a rate bureau agreement is obtained from the Commission.[12] But, having done so, they are subject to the conditions and modifications imposed by the Commission under Section 5a(2). Moreover, Section 5a(7) authorized the Commission to modify agreements it has already approved to assure conformity to the standard of Sections 5a(2) and 5a(6).

The petitioning carriers are seeking a narrow interpretation of the scope of the Commission's authority under Section 5a. The carriers seek to limit the I.C.C.'s authority to approval of only procedures for collective ratemaking. They would have the I.C.C. powerless to protect independent action. This limited interpretation is contrary to the plain words of the statute and the Congressional purpose, as the court of appeals correctly held.[13]

The court also correctly held that the Commission has properly harmonized the provisions of Sections 5a and 216(e).[14] Once the Commission found that, even in the absence of evil motivation, the practice of rate bureau protests undermined competition by restricting the right of in-

[12] See Section 5a(9), and 351 I.C.C. at 461, App. 92a.

[13] See 559 F.2d at 1253 and 1255, App. 4a, 6a-7a.

[14] The need for this harmonizing was recognized even by the dissenting judge in the court of appeals. See 559 F.2d at 1256, App. 11a.

dependent action, it was compelled to act as it did. When Congress enacted Section 5a, and granted a limited immunity from the antitrust laws for carrier rate bureaus, it nonetheless left the antitrust law otherwise entirely applicable to regulated carriers.[15] The I.C.C. has a duty when administering a statute which contains an express immunity from the antitrust laws to consider the policies of the antitrust laws, *McLean Trucking v. United States*, 321 U.S. 67, 77-88 (1944), and to narrowly interpret the scope of any immunity. *Federal Maritime Comm. v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973). These policies reflect the establishment of a "regime of competition as the fundamental principle governing commerce in this country." *City of Lafayette v. Louisiana P. & L. Co., supra*, 46 U.S.L.W. at 4267.[16]

The actions of the I.C.C. and the court of appeals are entirely consistent with these legislative policy directions. The limitation of the right of rate bureaus to protest was necessary to protect the right of independent action. If this involved an accommodation with the apparently conflicting provisions of Section 216(e), this is precisely the function of the Interstate Commerce Commission.

[15] H.R. Report No. 1100 (80th Cong. 1st Sess.) at 5, quoted by Mr. Justice Clark at 559 F.2d 1253, App. 4a.

[16] See also *Gulf States Utilities Co. v. F.P.C.*, 411 U.S. 747, 759 (1973) and *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973).

CONCLUSION

The petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit should be denied. There is no constitutional issue which requires review by this Court. The actions of the Interstate Commerce Commission and the court of appeals correctly applied the provisions of the Interstate Commerce Act which are involved.

Respectfully submitted,

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